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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 378

LEO SHAFFER, JULES HORWICK and
EDGAR M. WYATT,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Leo Shaffer, Jules Horwick and Edgar M. Wyatt, respectfully request a hearing in this cause, which was decided on November 13, 1961, by an order denying Petitioners' Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Under Rule 58(1) of the Rules of this Court the petition for rehearing in this cause was due to be filed not later

than December 8, 1961, but on application of the attorneys for Petitioners the time for filing the said petition was extended to December 18, 1961 by an order of Mr. Justice Tom C. Clark, entered December 7, 1961.

The petitioners surrendered in open Court on November 27, 1961 before the Honorable Cale J. Holder, Judge of the United States District Court of Indiana and are presently serving the sentence imposed on them in the Federal Institution at Terre Haute, Indiana.

A CIRCUMSTANCE OF SUBSTANTIAL OR CONTROLLING EFFECT HAS INTERVENED SINCE THE FILING OF THE PETITION FOR A WRIT OF CERTIORARI.

Shortly after the Petition for a Writ of Certiorari was denied a decision of the Court of Appeals for the Second Circuit became available to Counsel for Petitioners. This Second Circuit case, *United States* v. *Vita, et al*, 294 F. 2d 524, is in conflict with the decision of the Seventh Circuit in this case, in the application and interpretation of *Marshall* v. *United States*, 360 U.S. 310.

The *Vita* decision was made by the Second Circuit on August 28, 1961, but was not reported in the Federal Reporter, Second Series, until November 6, 1961, and hence was unavailable to counsel until after the latter date.

The Marshall Rule in the Second Circuit

In *United States* v. *Vita, supra*, Carmel and Vita were convicted in the District Court for the Eastern District of New York of bank robbery, endangering lives by use of dangerous weapons while robbing the bank, and conspiracy to commit the robbery. The convictions were appealed on several points, the pertinent one of which was

the trial court's handling of jury exposure to prejudicial newspaper coverage.

On the second day of trial, two Long Island newspapers published articles concerning the case.

> "One of the articles was published in 'Newsday' and contained information concerning Carmel's conviction for bank robbery in Miami, Florida. The other account was in the 'Long Island Daily Press' and made no references to any convictions." (Opinion, *United States* v. *Vita*, 294 F. 2d at 527)

After Carmel's counsel called the judge's attention to the articles, the judge asked the jury whether any had read them. Two indicated they had. One said he had read the "Newsday" article only; the other said he had read only the article in the "Long Island Daily Press."

Both jurors denied communicating the articles' contents to their fellow jurors. Both stated they could judge the case fairly despite having read the articles.

The trial judge held that the "Daily Press" story was "innocuous", that it contained nothing improper or inadmissible, that it could not have influenced the juror who had read it. He allowed the juror to remain.

The other juror who had read "Newsday" was excused, and an alternate was substituted.

In reviewing this phase of the case, Chief Judge Lumbard approved the trial judge's removal of the juror who had read "Newsday" as being required by the *Marshall* decision, in these words:

> "In light of *Marshall* v. *United States*, 1959, 360 U.S. 310, *the substitution of an alternate juror was necessary since the 'Newsday' account contained prejudicial information.* But we agree with the dis-

> trict judge that the story in the 'Long Island Daily Press' could not have prejudiced the defendant since it contained no inadmissible or improper matter." (Emphasis added.) (*United States* v. *Vita*, 294 F.2d 524).

By distinguishing between the two articles and the two jurors as it did in the *Vita* case, the Second Circuit has unmistakably demonstrated its understanding of the Marshall Rule. If a juror admits he has read an article (or heard a newscast) containing prejudicial information, he must be immediately excused. Even if the juror tells the trial judge "that he would not be influenced by the news articles, that he could decide the case only on the evidence of record, and that he felt no prejudice against the [defendant] as a result of the articles," he must be excused. (The quoted language is from this Court's resume' of the facts in *United States* v. *Marshall*, 360 U.S. at 312.)

The Marshall Rule in the Seventh Circuit

The meaning of *Marshall* v. *United States* in the Seventh Circuit is completely different from its meaning in the Second, although the *Marshall* decision was rendered by this Court:

> "[i]n the exercise of our supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts . . ."

This Court's plain object was a uniform rule to achieve equal justice in all federal courts.

But in petitioners' case, the Seventh Circuit approved a result that would have been reversed in the Second Circuit, and, we believe, by this Court.

> "There is no question but what the material circulated through the press and other communication media contained statements prejudicial to the defend-

> ants, characterizing some as professional gamblers, others as ex-convicts, and containing representations of prior criminal activities and convictions." *United States* v. *Shaffer*, 291 F.2d 689, 694.

The Court of Appeals conceded that the articles about petitioners were prejudicial.

Nine of the twelve jury-members admitted being exposed to newspaper articles and television newscasts on the day preceding the trial. (Petition No. 379, p. 10) As in the *Vita* case, each stated he had formed no opinion of defendants' guilt because of the prejudicial news coverage, and each stated he could decide the case only on the evidence presented.

Yet, the trial court refused to grant the continuance or the change of venue requested by the petitioners. The Seventh Circuit found no error in this, in allowing jurors to judge defendants in the Seventh Circuit who would be disqualified as jurors in the Second Circuit. Justice Castle held that the Marshall Rule did not apply because the trial judge offered the petitioners "unlimited additional peremptory challenges." Judge Castle further implies that the offer was to cure the poison of the publicity. *But nowhere in the trial record can it be found that the trial judge offered either "unlimited" peremptory challenges or offered them to eliminate jurors who had read or listened to prejudicial news accounts.* See Petition, No. 379, pp. 11-13.

Petitioners had found that almost the entire panel was exposed to the publicity and knew that no fair jury could be obtained from that panel, at that time, in that place. They had therefore challenged *for cause* the panel and each juror who had read or heard the prejudicial publicity. They also made the motions to continue and to change venue. Counsel could do no more.

The Seventh Circuit seized this unusual and ambiguous offer of the trial judge to support an affirmance of an abuse of discretion by the trial judge that flies in the face of the Marshall Rule. The only line of *Marshall* v. *United States* to which that Court of Appeals paid any heed was the generality that the trial judge has a "large discretion" in this area. It read no further.

The trial judge has "large discretion" but once he realizes prejudice exists, he must act effectively to neutralize it. He cannot offer the defendants a useless remedy —as the judge did here—and contend he has protected them. He must deal effectively. In this case only a continuance or a change of venue would really have sufficed. This Court in *Krulewitch* v. *United States*, 336 U.S. 440, 453, indicated that the trial judge *must conscientiously do all he can* to protect the defendants from publicity prejudice. This Court does not ask defendants to employ a remedy that is useless. *Maryland* v. *Baltimore Radio Show*, 338 U.S. 912, 913. But the Seventh Circuit says that *Marshall* v. *United States* does not apply to petitioners because the trial judge offered them a useless remedy.

As a result petitioners were tried by a jury of conceded prejudice. The Court of Appeals explicitly stated that the newspaper and television material was "prejudicial". By what means could it prejudice petitioners except through the jury? Yet the Court of Appeals found no need to apply the *Marshall* decision because the petitioners did not use challenges offered to them ambiguously and offhand and under circumstances—since virtually the whole panel was infected—in which their utilization would be nugatory. Only a continuance or a change of venue could really have protected petitioners.

United States v. *Vita* and *United States* v. *Shaffer* meet head on. Only this Court can resolve the conflict and carry out its purpose of providing a proper and uniform rule.*

THE GOVERNMENT FAILED TO PROVE THAT THE PETITIONERS ATTEMPTED TO DEFEAT THE TEN PERCENT EXCISE TAX AND FAILING TO PAY SAID TAX.

The foregoing presents substantial grounds available to petitioners which were not previously presented. (See Rule 58(2) of the Rules of the Supreme Court of the United States.)

Counts 2, 3, and 4 charged the petitioners did willfully attempt to evade and defeat the ten percent excise tax on wagers by failing to make Form 730, the wagering excise return to the District Director of Internal Revenue for the District of Indiana; and "by failing to pay to the said District Director of Internal Revenue . . . the said wagering tax due and owing"; and by doing certain acts, to-wit: concealing the wagering business, concealing the identities of the copartners, maintaining incorrect books of the amount of wagers received by the defendants, causing to be destroyed memoranda and wagering slips which would

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* 1. Trial in Petitioners' case began on June 22 and the judge questioned jurors about reading the June 21 newspaper articles. Some jurors had been selected in May and were warned not to read the papers about the case. When the trial judge encountered Juror Bain who had been so warned and found that Bain had been reading the papers, the judge excused him *for cause* (D.A. 165). This is somewhat ambiguous in view of the fact he did not excuse other jurors apparently simply because they hadn't been told not to read the papers.

2. The judge's questions to the jury seemed designed to obtain favorable answers.

indicate the identities of persons placing wagers with the defendants and the gross amount of such wagers, for the months of September, October and November, respectively. (Deft's App. 23-28).

Count 1 charged a conspiracy to commit the foregoing acts plus conspiracy to engage in the business of accepting wagers without paying the special tax imposed by Section 4411 of the Internal Revenue Code and failing to register with the District Director as required by Section 4412 of the Code.

Section 1, Title 18 U.S.C. defines a felony as any offense punishable by imprisonment for a term exceeding one year. Any other offense is a misdemeanor.

Section 7201, Title 26 U.S.C. provides:

> "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

Section 7203, Title 18 U.S.C. provides:

> "Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return . . . keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than one year, or both, together with the costs of prosecution."

Section 371, Title 18 U.S.C. punishes the crime of conspiracy with imprisonment not exceeding five years, but if the offense which is the object of the conspiracy, is a misdemeanor only, the punishment shall not exceed the maximum punishment provided for such misdemeanor.

The Government failed to prove, beyond a reasonable doubt, that the failure to pay the excise tax was a willful attempt to defeat and evade the ten percent excise tax levied on wager. Count 2 charged that the defendants named therein, including the petitioners, accepted wagers during September 1957 in the amount of $326,315.20 upon which a ten percent excise tax was due in the sum of $32,631.52 (Deft. App. 23). Count 3 alleged that the defendants accepted wagers during October 1957 amounting to $1,305,260.80 upon which the excise tax due was $130,526.08 (Deft. App. 25). Count 4 stated that the defendants accepted wagers in November 1957 totalling $1,631,576.00; the excise tax due thereon was $163,157.60 (Deft. App. 26-27).

The total tax imposed, therefore, is $326,315.20. It is conceded that this total excise tax was not paid. The question is whether the failure to pay this tax is a violation of Section 7201, Title 26, which defines a felony or of Section 7203, Title 26, which defines a misdemeanor, or whether there was an absolute inability to pay the tax so as to justify a verdict of not guilty.

An examination of the testimony of the Government "bettor" witnesses does not disclose a single instance where the excise tax was passed on to the bettor, nor did the Government introduce any proof whatever that the excise tax was collected from any bettor. There wasn't a scintilla of testimony or evidence introduced by the Government that the defendants had sufficient money or other assets with which to pay the tax. In order to raise the

failure to pay the tax to the degree of felony it was incumbent upon the Government to prove beyond a reasonable doubt that the defendants were able to pay the tax but refused or willfully failed to do so. *Spies* v. *United States* (1943), 317 U.S. 492. This case points out (p. 493):

> "Section 145(a) makes, among other things to pay a tax or make a return by one *having petitioner's income* at the time or times required by law a misdemeanor."* (Emphasis supplied.)

In *United States* v. *Bardin*, 224 F. 2d 255, the Government proved beyond a reasonable doubt that Bardin had funds with which to pay the tax due the Government, or a major part of it, but refused to do so.

We then come to the charges that petitioners attempted to defeat and evade the excise tax by concealing the true and correct amount of wagers accepted by them, keeping books which did not reflect the correct amount of wagers, destroying wagering slips which would indicate the identities of the bettors and the gross amount of wagers.

The Government failed utterly to prove the commission of any of such acts. On the other hand the Government's proof showed the defendants did *not* conceal the true amount of wagers, that they did *not* destroy wagering slips that identified the bettors and the gross amount of wagers.

Government agents searched and seized papers and documents by virtue of a search warrant. (See motions to quash search warrant, Deft. App. 29-33.) The return on the search warrant showed the seizure of "information concerning football games; large lined cards and sheets; miscellaneous business receipts; one book-keep book; *bet-*

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* Now Section 7203, heretofore set forth.

ting slips; football schedules; score cards for football games; betting pads; keys; horse racing sheets" and other property. (Pltf. App. 2182.)

The Government introduced its Exhibit No. 136, wagering slips which were identical as being in the handwriting of defendants, Gordon, Tamer, Horwick, Share, Shaffer and Wyatt showing wagers made with them (Pltf. App. 2225-2228).

The summary of Exhibit 138 showing wagers received by the defendants appears in Volume III of Pltf. App. on an unnumbered page, fourth page from the end of the volume.

Government witness Glen Johnson testified from records obtained by him at 671½ Wabash Avenue, the premises occupied by the defendants, on November 29, 1957; from those records he was able to determine the total amount of wagers accepted by the defendants. His testimony indicated a large amount of the wagers were amounts receivable or due the defendants. He was able to testify to the total amounts of wagers *accepted* by the defendants from their records seized on November 29, 1957, from which the excise tax was computed. (Deft. App. 1289-1333)

Handwriting experts Doulder and Schroeder, Government witnesses, were able to identify the handwriting of the defendants on the *wagering tickets.* (See Petition No. 378, page 12.)

It thus appears that the petitioners did not attempt to defeat and evade the said excise tax or the payment thereof by any of the means or acts alleged in the indictment and that the verdicts of guilty on Counts 1, 2, 3 and 4 of the indictment and the sentences imposed thereon were erroneous.

Wherefore, Petitioners pray that a rehearing may be granted to the end that the order denying the Petition for a Writ of Certiorari may be set aside and the said Petition be granted.

Respectfully submitted,

Leo Shaffer, Jules Horwick and
Edgar M. Wyatt, *Petitioners*

By Richard E. Gorman and
Myer H. Gladstone,
Their Attorneys.

NO. 378

LEO SHAFFER, JULES HORWICK AND EDGAR M. WYATT,
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MYER H. GLADSTONE does hereby certify that he is one of the attorneys for the petitioners and does further certify that the petition for rehearing filed in this cause is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2) of the Rules of the Supreme Court, to-wit: to intervening circumstances of substantial or controlling effect and to a substantial ground available to petitioners though not previously presented.

The petitioners have been surrendered on November 27, 1961, and are presently confined in the United States Institution at Terre Haute, Indiana.

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MYER H. GLADSTONE